Office-Supreme Court, U.S.
FILED
FEB 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1388

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD D. DOWE

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES W. HALLECK
1825 K Street, N.W.
Suite 720
Washington, D.C. 20006
(202) 331-0022

Attorney for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Should a Federal prosecutor be required to abide by a plea bargain offer made to, and accepted by, a defendant, as the Fourth Circuit ruled in *Cooper* v. *United States*, 594 F.2d 12 (4th Cir. 1979); or is there no Fifth and Sixth Amendment prohibition against the withdrawal by a prosecutor of an already accepted plea agreement, as the Third Circuit ruled in *Government of Virgin Islands* v. *Scotland*, 614 F.2d 360 (3rd Cir. 1980)?

2. Should a Federal prosecutor be required to abide by a plea bargain offer made to a defendant, who has accepted the offer and complied with some of the conditions required by the plea bargain to his detriment, when that prosecutor later seeks to withdraw the plea bargain offer prior to the actual entry of the defendant's plea?

3. Whether a Federal trial judge, in contravention of the holding of *United States* v. *Coplon*, 185 F.2d 629 (2nd Cir. 1950), can refuse to let the defense see relevant documents which were presented by the prosecutor, and read *in camera* by the judge, and upon which in part the judge subsequently based his findings that "extenuating circumstances" existed which justified the prosecutor in revoking a plea offer previously accepted and partially performed by the defendant?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
TABLE OF CONTENTS	(iii)
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES

Cooper v. *United States*, 594 F.2d 12 (4th Cir. 1979) ..... (i), 7, 8
Government of Virgin Islands v. *Scotland*, 614 F.2d 360 (3d Cir. 1980) ..... (i), 6, 7
Santobello v. *New York*, 404 U.S. 257 (1971) 7
United States v. *Coplon*, 185 F.2d 629 (2d Cir. 1950) ..... (i), 8, 9

MISCELLANEOUS

U.S. CONST. amend V ..... (i), 2, 7, 8
U.S. CONST. amend VI ..... (i), 2, 7, 8
21 U.S.C. § 841(a) 2, 3
28 U.S.C. § 1254(1) 2
33 D.C. Code § 402 3

PREVIOUS PAGE WAS BLANK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

CLIFFORD D. DOWE

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the United States District Court for the District of Columbia (Aubrey E. Robinson, Jr., Judge) dated May 23, 1979, denying defendant's motion to enforce plea bargain, are unreported and appear herein as Appendix A, page 1a.

The Judgment Order of the United States Court of Appeals for the District of Columbia Circuit affirming the District Court, is unreported, and appears herein as Appendix B, page 6a.

The motion to extend time to file petition for rehearing, granted by the United States Court of Appeals for the District of Columbia Circuit on November 25, 1980,

is unreported and appears herein as Appendix C, page 8a.

The Petition for Rehearing, filed by the appellant Clifford D. Dowe, in the United States Court of Appeals for the District of Columbia Circuit appears herein as Appendix D, page 10a.

The Order of the United States Court of Appeals for the District of Columbia Circuit, dated December 4, 1980, recalling the mandate is unreported and appears herein as Appendix E, page 14a.

The Order of the United States Court of Appeals for the District of Columbia Circuit denying the petition for rehearing, dated December 19, 1980, is unreported, and appears herein as Appendix F, page 15a.

JURISDICTION

The judgment of the United States Court of Appeals, affirming the Order of the United States District Court for the District of Columbia, and for which certiorari is sought, was entered on October 22, 1980 (Appendix B, page 6a). The Court extended until November 27, 1980, the time within which petitioner could file a petition for rehearing (Appendix C, page 8a). The petition for rehearing was timely filed, on November 26, 1980 and was denied by an order dated December 19, 1980 (Appendix F, page 15a). The instant petition is being filed within sixty days of December 19, 1980, the date of the denial of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments Five and Six of the United States Constitution, and 21 U.S.C. § 841(a) are set forth herein as Appendix G, page 16a.

STATEMENT OF THE CASE

This case presents an important question, about which there exists a split of authority within the Circuit Courts of Appeal, involving the obligation of prosecutors to abide by and perform plea bargain agreements they enter into with defendants. This split of authority exists over whether such agreements must be enforced at the point where (a) the plea offer is made and agreed to by the defendant; or at a later point where (b) the defendant has acted to his detriment in reliance on the offer; or at an even later point where (c) the defendant has actually entered his guilty plea in reliance on the plea agreement. Equally important, and related to the foregoing issues, is the question whether a trial judge, at a hearing on a motion to enforce the plea bargain, may properly receive and consider documents *in camera*, presented by the prosecution in support of its claim that newly discovered "extenuating circumstances" justify withdrawing a plea offer previously accepted, when the trial judge then refused the request of the defense to see those documents in order to be able to rebut such prosecutorial claims.

The context in which these issues are presented arose when Clifford Dowe was charged and indicted for the felony of possession of four ounces of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a).[1]

Ongoing discussions between an Assistant United States Attorney assigned to the case and Mr. Dowe's counsel culminated in a plea agreement offer to Mr. Dowe, communicated through his attorney, to plead guilty to a single misdemeanor count. The offered plea

---

[1] Dowe was also charged with D.C. Code misdemeanor offenses of possession of cocaine (33 D.C. Code § 402), and possession of miniscule amounts of marijuana and hashish found in his wife's dresser drawer (33 D.C. Code § 402).

bargain required Mr. Dowe to do three things in exchange for the misdemeanor disposition: (a) name his source for the cocaine; (b) make a controlled purchase of narcotics from either his supplier or any other person similarly situated, in cooperation with narcotics' squad detectives, in order that they could secure a search or arrest warrant; and (c) commit himself to testify before the grand jury. That plea bargain offer was made on December 27, 1978.

Thereafter, Mr. Dowe and his counsel met with the prosecutor and two Metropolitan Police detectives at the prosecutor's office on January 2, 1979. There, Mr. Dowe accepted the tendered plea bargain and agreed to plead guilty to a misdemeanor, as well as comply with the three requirements.

Once the plea agreement had been made, Mr. Dowe identified his source in New York. At a meeting in the prosecutor's office, he answered questions put to him by both the prosecutor and two police detectives. He fully admitted his guilt to the pending cocaine charge, and identified documents seized from his home, explaining their meaning and purpose.

The questioning continued until late afternoon. The prosecutor advised Mr. Dowe that the grand jury had recessed for the day, and Mr. Dowe agreed to go before the grand jury at any time the prosecutor selected.

The meeting adjourned with the understanding that Mr. Dowe would have thirty (30) days within which to go before the grand jury and to participate in setting up the controlled buy of illicit narcotics as required by the tendered and accepted plea bargain.

Then, on January 5, 1979, the prosecutor notified defense counsel and the District Court judge at a status hearing that the plea bargain was to be withdrawn. It was later withdrawn by letter dated January 8, 1979.

On February 16, 1979, Mr. Dowe filed a motion to dismiss the indictment or alternatively, to enforce the plea bargain. A hearing was held on that motion on February 23, 1979.

At the hearing, the prosecutor sought to justify his abrogation of the plea agreement previously entered into, and partially performed by Mr. Dowe, on the ground that some anonymous law enforcement official had told one of the detectives who was at the January 2, 1979 meeting, that Mr. Dowe was allegedly involved, some years earlier, in some unspecified connection with drugs.

However, this detective claimed to have had that same information prior to, and at the time of, his participation in the formulation and offering of the plea agreement by the prosecutor which was accepted by Mr. Dowe on January 2, 1979.

During the hearing on the motion to enforce plea bargain, neither the prosecutor nor the detective, when called to testify, would disclose the source of the information, the details or the nature of the information, or the name or agency of the other "law enforcement official" who supposedly supplied such information about Mr. Dowe's previous activities.

Over repeated defense objections, the District Court judge received, *in camera*, the extensive written notes of both the detective and the prosecutor which purported to be notes made during their separate discussions with the unidentified official of an unidentified law enforcement agency. The judge refused to permit the defense to see the documents in spite of repeated requests, and repeated objections to such a procedure.

Three months later, on May 23, 1979, the District Court judge issued his ruling denying the motion to enforce the plea bargain. In his written findings, it was clear that the judge relied extensively on the *in camera*

documents, to which the defense was denied access and the opportunity to rebut. The District Court judge found that there had been a plea agreement offered and accepted by the defendant. The judge treated the partial performance of the plea agreement by Mr. Dowe as insufficient in the court's view of the law, for the court to compel the government to perform its part of the plea bargain. The court also (erroneously, so Mr. Dowe claims) concluded that the partial performance of the plea agreement by Mr. Dowe was not "detrimental" to Mr. Dowe. Finally, the court concluded that the information supplied by someone, all as disclosed by the *in camera* documents, constituted an extenuating circumstance justifying revocation of the plea agreement.

On November 9, 1979, Mr. Dowe waived jury trial, and was tried and convicted by the Court of the felony charge and two of the misdemeanor charges, and on January 25, 1980, Mr. Dowe was sentenced to a term of three years in prison, with a special parole term of three years.

REASONS FOR GRANTING THE WRIT

A split of authority in the Circuit Courts of Appeals has created uncertainty in the law regarding plea bargaining in Federal criminal cases. This uncertainty should be resolved by the United States Supreme Court in order that prosecutors and defendants alike may engage in the plea bargaining process with certainty.

Here, we are dealing with a defendants' agreement to plead guilty in accordance with the government's plea offer. As Judge Gibbons put it for the Third Circuit in *Government of Virgin Islands* v. *Scotland*, 614 F.2d 360 362 (1980):

> We are presented with the question of whether a defendant's agreement to plead guilty in accordance with the government's initial offer gives the defend-

ant a right to specific performance of the terms of that offer. The Fourth Circuit recently answered this question in the affirmative in *Cooper* v. *United States*, 594 F.2d 12 (4th Cir. 1979). We decline to follow the Cooper rationale.

In the instant case, a plea offer was made to Clifford Dowe, and required Dowe to do three things as part of the bargain. Dowe unequivocally accepted that offer, and thereafter completed one of the three requirements. His appearance before the Grand Jury was within the control of the prosecutor, not Dowe. His cooperation with the police to participate in a controlled buy was within the control of the police, not Dowe.

The Fourth Circuit, in *Cooper*, *supra*, relied on *Santobello* v. *New York*, 404 U.S. 257 (1971), in locating the core concept of the defendant's constitutional right to be treated with "fairness". Enlarging on that principle, the Fourth Circuit found a Fifth Amendment guarantee of substantive due process and a Sixth Amendment guarantee of effective assistance of counsel merged to justify enforcement of plea agreements entered into by a prosecutor.

The Third Circuit, in *Government of Virgin Islands* v. *Scotland*, *supra* found the facts in that case to be a stronger basis for ordering specific performance than existed in *Cooper*, because Scotland had accepted the plea offer prior to the government's withdrawal. Nevertheless, the Third Circuit declined to follow *Cooper*.

The Third Circuit, in *Government of Virgin Islands* v. *Scotland*, however, reached back to *Santobello* to conclude that where a defendant detrimentally relies on the government's promise, the due process guarantees bring into play a basic estoppel principle. Therefore, reasoned the Court, where a defendant had not yet entered his plea, but had relied on the bargain in such a way that a fair trial would no longer be possible, the gov-

ernment would be required to perform the plea agreement. Here, Clifford Dowe did indeed rely on the bargain, and not only named his source, but waived his Fifth Amendment rights in connection with the lengthy questioning by both police and prosecutors. In making numerous incriminating statements, and identifying and explaining documents seized from his home, Dowe had relied on the plea bargain to his detriment to the point that a fair trial was then jeopardized.

The District Court in the instant case misread *Cooper* in denying specific performance of the plea bargain. In *Cooper*, the Court held that where extenuating circumstances affecting the propriety of the plea proposal offered by the prosecutor, and which were unknown to and not reasonably discoverable by the government when the plea offer was made, come to light in the interval between the government offer and acceptance by the defendant, the offer may be withdrawn. The *Cooper* Court holds however that once an offer has been made, and the acceptance of that offer within a reasonable time occurs, the government must be bound by its bargain.

Although there exists a split of authority in the Circuits, under either rationale Dowe was entitled to enforcement of the plea agreement. No alleged information came to the prosecutor's attention in the interval between the plea offered on December 27, 1978 and its unequivocal acceptance on January 2, 1979. Moreover, the claimed information was known to the police involved in the plea offer negotiations, and in any event, the information was reasonably discoverable long before January 2, 1979.

A second issue exists for granting the writ. In *United States* v. *Coplon*, 185 F.2d 629 (2nd Cir. 1950), Chief Judge Learned Hand located a violation of the Sixth Amendment guarantee of the right to confront witnesses when a trial judge received, *in camera*, written sum-

maries of telephone calls offered by the prosecution, examined and relied on them, and refused to allow the defense to see them. Here, the District Court judge did exactly the same thing. He accepted *in camera* summaries of telephone calls to police and prosecutors. Those documents, which contained information which was not allowed to be brought out by cross-examination of the police and prosecutors when they testified, were denied to the defense, and thereafter relied on by the Court in its May 23rd decision.

The viability of the *Coplon* decision, and the extent of its application to various stages of pre-trial and trial proceedings is an important issue that deserves consideration by the United States Supreme Court.

CONCLUSION

For all of the foregoing reasons, it is respectfully suggested that certiorari be granted, that the judgment of the Court of Appeals be reversed, and that Judge Robinson be directed to order the government to abide by its original plea agreement. Alternatively, Judge Robinson should be directed to reopen the hearing on the motion to enforce the plea bargain, make available to the defendant the *in camera* documents, and allow the defendant to produce evidence to rebut matters contained in those documents.

Respectfully submitted,

CHARLES W. HALLECK
1825 K Street, N.W.
Suite 720
Washington, D.C. 20006

Attorney for Petitioner

Appendices

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 78-0642

UNITED STATES OF AMERICA,
Plaintiff

v.

CLIFFORD DOWE,
Defendant

[Filed May 23, 1979]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Defendant, Clifford D. Dowe, was arrested on September 28, 1978, upon the execution of a search warrant at his residence, 4843-16th Street, N.W., Washington, D.C., and the discovery of cocaine. He was subsequently indicted and charged with a single felony court of possession with intent to distribute cocaine and three misdemeanor counts charging separately possession of cocaine, marijuana and hashish. Through his counsel, Charles W. Halleck, the Defendant has moved for an order either to dismiss the indictment or require the Government to perform a plea bargain. Upon consideration of the Motion to Dismiss the Indictment or Alternatively Enforce Plea Bargain, the Points and Authorities filed in support thereof and in opposition thereto, the evidence received at hearing and argument of counsel, the Court finds facts as follows:

1.) At Defendant's scheduled preliminary hearing on October 19, 1978, Charles Halleck appeared for him and Assistant United States Attorney Howard L. Cushenberry, then assigned to the Grand Jury Section, appeared

for the United States. Defendant, through counsel, waived the preliminary hearing and immediately thereafter his Counsel discussed the case with the Assistant United States Attorney. Those discussions included a possible plea arrangement. Defense Counsel sought a misdemeanor disposition. The prosecutor indicated that he would explore that possibility if the Defendant would work with the Government and provide the Government with the name of his source. By agreement the time for indictment was extended for thirty (30) days to permit Defendant to consider the possible disposition and the Assistant U.S. Attorney to confer with his supervisor, Assistant United States Attorney Charles Roistacher, Chief of the Grand Jury Section. Two days before the expiration of the thirty (30) day period, Defense Counsel advised Cushenberry that the Defendant had not made up his mind as to whether he would cooperate. After the expiration of the thirty (30) day period, the Defendant was indicted on November 28, 1978, the Government not having been advised of his willingness to cooperate.

2.) On October 28, 1978, Roistacher wrote a memo to the Dowe file as follows:

> "To: Preliminary Hearing Assistant
>
> From: CHR
>
> 1. Reference to Dowe:
>
> As per prior discussion between HLC and CHR, no matter what this defendant does, he can't have a misdemeanor but his cooperation will be related to Court."

3.) Following indictement, Cushenberry had no further discussions with Halleck concerning Dowe's case. Halleck was advised to contact Assistant United States Attorney David Krakoff, the Assistant to whom the case had been assigned for trial. By telephone on December 4, 1978,

Halleck inquired of Krakoff whether Defendant could plead to a misdemeanor in exchange for giving the name of his supplier. Krakoff said he would have to check into the matter. On December 27, 1978, Krakoff communicated to Halleck the Government's offer to permit a misdemeanor plea if Defendant made a controlled purchase of narcotics from his supplier or any other person similarly situated in order to secure a search or arrest warrant and further committed himself to testify before the Grand Jury. In that same telephone conversation, Halleck agreed to meet in Krakoff's office on January 2, 1979, with the defendant to continue plea discussions.

4.) On January 2, 1979, the agreed upon meeting was held The Defendant, Halleck, Krakoff and two Metropolitan Police officers, Sgt. Raymond Gonzales and Detective John Centrella were present. After being advised that nothing he said could be used against him, the Defendant responded to questions about his involvement in illicit narcotics. He named an "Ed Greene" as the alleged source from whom he obtained the cocaine which is involved in the indictment. He declared that this was his only acquisition of illicit narcotics; that it was for his personal use; and that he didn't know anyone anywhere except his alleged source in New York from whom illicit narcotics could be obtained and thus could not provide assistance to the officers by a controlled buy. The police officers, referring to documents seized in his home, sought to dispute his lack of knowledge about illegal drug traffic in the Metropolitan Washington area. He was willing at this time to go before the Grand Jury. The January 2, 1979, meeting adjourned with the understanding that Defendant would have thirty (30) days to do the following in order to plead to a misdemeanor:

a) Participate in setting up a controlled buy of illicit narcotics in the Metropolitan Washington area from someone who distributed quantities of illicit

hard drugs comparable to that of his alleged New York source.

b) Appear before the Grand Jury.

5.) On January 4, 1979, Krakoff was informed by Detective Centrella that further checking by him with other law enforcement officers revealed information then unknown about Defendant's contacts with narcotics. Krakoff verified Centrella's information by conferring directly with the other law enforcement officials. This discrepancy between the information and that received from Defendant about his involvement with narcotics led to a determination by the United States Attorney's Office that a misdemeanor disposition would not be available to Defendant. This conclusion was disclosed to Defendant and his counsel on January 5, 1979, at the status hearing before this Court.

6.) Defendant had taken no further action in performance of the plea agreement between January 2, 1979, and its withdrawal by the Government on January 5, 1979.

CONCLUSIONS OF LAW

1.) Assistant United States Attorney David Krakoff extended a formal plea offer to the Defendant's attorney on December 27, 1978, and reiterated its terms to the Defendant and his attorney on January 2, 1979.

2.) Before Krakoff revoked the plea offer on January 5, 1979, Defendant had done nothing to perform his obligations under the offer such as would compel this Court to order the Government to either perform the plea bargain or dismiss the indictment. *See United States* v. *Carter*, 454 F.2d 426, 427-28 (4th Cir. 1972); *United States* v. *Paiva*, 294 F. Supp. 742, 747 (D.D.C. 1969).

3.) Before Krakoff revoked the plea offer on January 5, 1979, the defendant had done nothing to his detriment in reliance on the plea offer that would compel this Court to order the Government to either perform the plea bargain or dismiss the indictment. *See United States* v. *Carter*, 454 F.2d at 427-28; *United States* v. *Paiva*, 294 F. Supp. at 747.

4.) The discovery by the United States Attorney's Office on January 4, 1979, of information not previously known to it concerning Defendant's contact with narcotics that was directly contrary to Defendant's representations was an extenuating circumstance justifying Krakoff's revocation of the offer on January 5, 1979, within the meaning of *Cooper* v. *United States*, No. 77-2288, slip op. at 18 (4th Cir., March 5, 1979).

Based upon the foregoing, it is by the Court this 23rd day of May, 1979,

ORDERED, that Defendant's Motion to Dismiss the Indictment or Alternatively Enforce Plea Bargain be and hereby is DENIED.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Criminal No. 78-00642
No. 80-1129

UNITED STATES OF AMERICA,

v.

CLIFFORD D. DOWE

Appellant

Appeal from the United States District Court for the District of Columbia

[Filed Oct. 22, 1980]

Before: TAMM and ROBINSON, Circuit Judges and WOOD*, Circuit Judge, United States Court of Appeals for the Seventh Circuit

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

---

* Sitting by designation pursuant to 28 U.S.C.§ 291(a).

The duty of counsel to furnish effective representation does not require the filing of a suggestion for rehearing *en banc*, unless the case meets the rigid standards of Federal Rule of Appellate Procedure 35(a).

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1129

CLIFFORD D. DOWE
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

[Filed Nov. 17, 1980]

MOTION TO EXTEND TIME WITHIN WHICH TO FILE PETITION FOR REHEARING

Appellant, through counsel, hereby moves this Court to extend the time for filing a Petition for Rehearing, under Rule 40, Federal Rules of Appellate Procedure, to and including November 27, 1980. As reason therefore, counsel states that the certified mail letter containing the copy of this Court's Judgment affirming the District Court's judgment was not received through the U.S. mail, until Wednesday, November 12, 1980. The envelope bears no postmark.

Consequently, since the Judgment was filed on October 22, 1980, time for filing a Petition under Rule 40 had expired before either appellant or his counsel was ever aware that the appeal had been decided. Counsel must have an opportunity to consult with appellant and determine if a Petition for Rehearing is to be filed. Hence, the requested extension of time herein seeks the 14 days allowed by Rule 40 from the date of actual notice and receipt by appellant's counsel of a copy of the unpublished Judgment Order.

The Appellate Division of the U.S. Attorney's Office has been contacted, and they do not object to the extension of time herein requested.

Respectfully submitted,

/s/ Charles W. Halleck
CHARLES W. HALLECK
Attorney for Appellant
1825 K Street, N.W. Suite 720
Washington, D.C. 20006
(202) 331-0022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Extend Time Within Which to File Petition for Rehearing was mailed to John Terry, U.S. Attorney's Office, Courthouse, Washington, D.C. 20001 this 14th day of November, 1980.

/s/ Charles W. Halleck
CHARLES W. HALLECK

[MOTION GRANTED
/s/ George A. Fisher
GEORGE A. FISHER, Clerk]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1129

CLIFFORD D. DOWE
Appellant,

vs.

UNITED STATES OF AMERICA
Appellee.

PETITION FOR REHEARING

CHARLES W. HALLECK
Attorney for Appellant
1825 K Street, N.W.
Suite 720
Washington, D.C. 20006
(202) 331-0022

ARGUMENT

Appellant, Clifford Dowe, by counsel, petitions this Court for rehearing and reconsideration of its judgment order affirming the District Court's denial of his Motion to enforce a plea bargain.

Two reasons are present for rehearing. First, appellant argued, and the prosecution agreed, that in the event there had been detrimental reliance by the defendant on the plea bargain, the government must abide by its offer. (Appellee's brief, pp. 20-21). In this case, the facts show that appellant Dowe disclosed the name of his source, and thereafter answered extensive questions by the prosecution and police. In addition, Dowe agreed to go before the Grand Jury, and to assist in a controlled buy.

Indeed, so there could be no question, the trial court finally found that there had been a plea bargain, or a "deal", struck between the prosecution and Dowe. At page 69 of the transcript, the Court said:

> I am talking about the fact that you can't walk out of a deal without some legitimate reason. There has got to be a reason.

The trial court found, beyond doubt, that an agreement was made. An offer of a misdemeanor plea was made, and accepted. Thereafter, appellant Dowe began doing those things he was required to do. He partially performed, and stood ready and willing to complete the remaining requirements.

What this court's unpublished order does is to leave completely unclear whether a partial performance, in detrimental reliance, by a defendant who has a plea bargain, is or is not sufficient to invoke the rule recognized by the government at pages 20 and 21 of its brief. Appellant respectfully suggests that the answer to that

question is critical not only to him, but to all other defendants who may be similarly situated in the future. The question, then, is whether all requested terms of a plea bargain must be finally completed by a defendant before he can be sure the prosecution cannot change its mind. If such a stringent rule is to be set forth, then both Dowe and others to follow should know that partial performance, in the most serious detrimental reliance on the plea agreement, will not protect defendants from a subsequent withdrawal of the plea agreement. The issue is one of substantial importance in this Circuit, and for that reason, appellant requests rehearing.

Second, appellant requests rehearing on the issue addressed in *United States* v. *Coplon*, 185 F.2d 629 (2d Cir. 1950). That case held that it was clear error for a trial judge to accept and rely on documents tendered by the prosecution, but never shown to the defendant.

Here, the most critical part of this case was the hearing on the Motion to Enforce Plea Bargain. Here, without question, the prosecutor tendered documents to the trial court during the hearing, and in spite of the defense requests, repeated on several occasions, the trial court refused to allow the defense to see the documents. The trial judge relied on those documents in making his ruling.

The importance of this question is pointed up by the trial court's announcement, quoted *supra*, that the prosecutor could not walk out of a deal without some legitimate reason. The reason, apparently supported by the documents in question, was a second-hand hearsay allegation that Dowe was involved in some other unspecified drug law violations. Those allegations by nameless, faceless drug agents or officials were apparently devastating. Defendant Dowe, whose prior record was clean, was denied the ability to rebut or defend against those allegations. Had Dowe been allowed to see the documents

which the Court saw and relied upon, he could have effectively countered those charges by testimony of either himself or other witnesses.

Here, the question of the viability of the *Coplon* decision in this Circuit is of major importance both to Dowe and to District Court judges and defendants who may in the future face the same situation. Must such documents, presented by the prosecutor to the Court, be made available to the defense? *Coplon* says "Yes". This court's judgment orders seems to say "No". The issue is of great enough importance to require rehearing and a guiding exposition of the issue by this Court.

For the foregoing two reasons, appellant Dowe respectfully requests rehearing on this appeal.

/s/ Charles W. Halleck (rcb)
CHARLES W. HALLECK
Attorney for Appellant
1825 K Street, N.W.
Suite 720
Washington, D.C. 20006
(202) 331-0022

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Rehearing was mailed, this 25th day of November, 1980, to John Terry, Esq., Assistant U.S. Attorney, U.S. Courthouse, Washington, D.C.

/s/ Charles W. Halleck (rcb)
CHARLES W. HALLECK

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Criminal No. 78-00642

No. 80-1129

UNITED STATES OF AMERICA

v.

CLIFFORD D. DOWE,

Appellant

[Filed Dec. 4, 1980]

ORDER

It appearing that the mandate in this case issued on November 14, 1980 and that, thereafter, this Court enlarged the time within which a petition for rehearing could be filed, and it further appearing that appellant has, in fact, filed such a petition for rehearing and that petition is presently under consideration by the Court, and upon consideration of appellant's motion to recall mandate, it is

ORDERED, that appellant's motion to recall mandate is granted and the Clerk of the District Court is directed to return forthwith the mandate previously issued in this case.

FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Criminal 78-00642

No. 80-1129

UNITED STATES OF AMERICA

v.

CLIFFORD D. DOWE,

Appellant

Before: Tamm and Robinson, Circuit Judges; and Wood *, Circuit Judge for the U.S. Court of Appeals for the Seventh Circuit

[Filed Dec. 19, 1980]

ORDER

Upon consideration of appellant's petition for rehearing, it is

ORDERED, by the Court, that appellant's aforesaid petition is denied.

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

---

* Sitting by designation pursuant to Title 28 U.S. Code Section 291(a).

APPENDIX G

Amendment 5, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

21 U.S. Code, § 841(a):

> **§ 841. Prohibited acts A—Unlawful acts**
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.